Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-847 OF 1995
SITI NORMA YAAKOB, ABU MANSOR AND ABDUL MALEK AHMAD JJCA
31 MARCH 1997

Companies and Corporations *— Winding up — Opposition to petition — Service of affidavits in opposition did not comply with r 30(1) of the Companies (Winding-up) Rules 1972 — Whether such affidavits ought to be admitted — Whether winding up proceedings ought to be stayed — Companies (Winding-up) Rules 1972 r 30(1)*

The respondent bank ('the bank') approved an overdraft facility for RM5.5m to the borrower for a period of one year and repayable on demand. The overdraft facility was secured by a first legal charge created on the charged land of which the appellant company ('the company') was the registered proprietor at the material time. Owing to a default by the company, the charged land was subsequently auctioned on 19 September 1988. Since the proceeds of the sale were insufficient to settle the borrower's indebtedness in full, the bank filed a civil suit against the company, claiming the balance of the sum owing with interests. Summary judgment was obtained by consent and thereafter the bank took steps to enforce the judgment sum by way of a statutory notice dated 30 November 1991 under s 218 of the Companies Act 1965 ('the Act') and served on the company. The company failed to comply with the notice and the bank issued a winding-up petition.

On 21 September 1992, three days before the hearing, the company filed a notice of intention to oppose the petition on the ground that they dispute the debt due to the bank. The petition was adjourned several times and was finally heard on 24 November 1995. On each adjournment, an affidavit in opposition was served on the bank; however, the affidavits were not served in compliance with r 30(1) of the Companies (Winding-up) Rules 1972 ('the 1972 Rules') which states that such affidavits should be served on the petitioner or his solicitor at least seven days before the time appointed for hearing of the petition. The bank raised the preliminary objection that the court should not admit the four affidavits on the ground that they had failed to comply with r 30(1) of the 1972 Rules. The learned judge agreed with the bank and ordered that the company be wound up, the official receiver be appointed as provisional liquidator and the bank's costs be paid out by the provisional liquidator from the company's assets. The company appealed, arguing that the judge's refusal to grant an adjournment of the hearing to the petition on 24 November 1995 had prejudiced the company and that since the trial judge had never heard the petition on its merit, the winding-up order made by him could not be upheld.

Held, dismissing the appeal:

(1) Section 221 of the Act empowers the court with the discretion to grant an adjournment, but in this case, the judge had refused to exercise his discretion and he had rightly done so for the following reason, namely, that the four affidavits supporting the company's notice of intention to oppose the petition did not comply with r 30(1) of the 1972 Rules which states that such affidavits should be served on the petitioner or his solicitor at least seven days before the time appointed for hearing of the petition.

Moreover, r 30(1) of the 1972 Rules is mandatory in nature and therefore the judge was correct when he refused to admit all four affidavits in opposition for non-compliance of r 30. The fact that the four affidavits were only relied upon on 24 November 1995 did not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other (see pp 761G–I and 762F–G).

(2) It was unjust and inequitable to stay the winding up proceedings and deny the bank the right to have the company wound up for their inability to pay the debt. This was because the cross-claim by the company could still be proceeded by the liquidator on behalf of the company under s 236(2) of the Act.

Also, the petition was presented five years ago and the company's indebtedness had been established as long ago as 1984. Proceedings in the form of execution of judgment should never be allowed to drag and more so where proceedings concerned the compulsory winding up of a company (see pp 762I and 763A).

[Bahasa Malaysia summary

Penentang, yang merupakan sebuah bank ('bank tersebut'), meluluskan kemudahan overdraf sebanyak RM5.5 juta kepada peminjam untuk jangkamasa selama setahun dan harus dibayar balik atas tuntutan. Kemudahan overdraf diperolehi melalui suatu gadaian sah pertama yang diwujudkan atas tanah yang digadai yang mana syarikat perayu ('syarikat tersebut') adalah tuan punya berdaftar pada masa material. Atas keingkaran oleh syarikat tersebut, tanah yang digadai kemudiannya dilelong pada 19 September 1988. Oleh kerana hasil jualan tidak mencukupi bagi menyelesaikan hutang peminjam sepenuhnya, bank tersebut memfailkan suatu guaman sivil terhadap syarikat tersebut, dengan menuntut baki jumlah yang terhutang dengan faedah. Penghakiman terus diperolehi dengan izin dan selepas itu bank tersebut mengambil langkah untuk menguatkuasakan jumlah penghakiman melalui satu notis statutori bertarikh 30 November 1991 di bawah s 218 Akta Syarikat 1965 ('Akta tersebut') dan menyampaikannya ke atas syarikat tersebut. Syarikat tersebut gagal mematuhi notis itu dan bank tersebut mengeluarkan satu notis pengulungan.

Pada 21 September 1992, tiga hari sebelum pembicaraan, syarikat tersebut memfailkan satu notis tentang hasrat untuk menentang petisyen itu atas alasan bahawa mereka mempertikaikan hutang kepada bank tersebut. Petisyen telah ditangguh beberapa kali dan akhirnya didengar pada 24 November 1995. Pada setiap penangguhan, satu afidavit menentang disampaikan atas bank tersebut; walau bagaimanapun, afidavit tersebut tidak disampaikan dengan mematuhi k 30(1) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah 1972') yang menyatakan bahawa afidavit sedemikian haruslah disampaikan atas pempetisyen atau peguamcaranya sekurang-kurangnya tujuh hari sebelum masa yang ditetapkan untuk mendengar petisyen. Bank tersebut membangkitkan bantahan permulaan bahawa mahkamah tidak patut menerima empat afidavit itu atas alasan bahawa mereka telah gagal mematuhi k 30(1) Kaedah 1972. Hakim yang arif bersetuju dengan bank tersebut dan memerintah supaya syarikat tersebut digulung, pegawai penerima dilantik sebagai penyelesai sementara dan kos bank tersebut dibayar oleh penyelesai sementara daripada aset syarikat tersebut. Syarikat tersebut merayu, dengan menghujahkan bahawa keengganan hakim untuk memberikan penangguhan pembicaraan petisyen pada 24 November 1995 telah memudaratkan syarikat tersebut dan bahawa oleh kerana hakim perbicaraan tidak pernah mendengar petisyen itu atas merit, perintah penggulungan yang dibuatnya tidak boleh dipertahankan.

Diputuskan, menolak rayuan:

(1) Seksyen 221 Akta tersebut memberikan mahkamah kuasa budi bicara untuk memberikan penangguhan, tetapi dalam kes ini, hakim telah enggan melaksanakan budi bicaranya dan beliau adalah betul dalam berbuat demikian atas alasan berikut, yakni bahawa keempat-empat afidavit yang menyokong notis hasrat syarikat tersebut untuk menentang petisyen itu tidak mematuhi k 30(1) Kaedah 1972 yang menyatakan bahawa afidavit demikian harus disampaikan atas pempetisyen atau peguamcaranya sekurang-kurangnya tujuh hari sebelum masa yang ditetapkan untuk pembicaraan petisyen.

Tambahan pula, k 30(1) Kaedah 1972 adalah bersifat mandatori dan oleh itu hakim adalah betul apabila beliau enggan menerima keempat-empat afidavit yang menentang atas ketidakpatuhan k 30. Fakta bahawa keempat-empat afidavit hanya digunakan pada 24 November 1995 tidak menukar kedudukan kerana afidavit sedemikan bertujuan digunakan dalam pembicaraan yang lebih awal yang tidak berlaku kerana kesemua pembicaraan yang lebih awal ditangguh kerana beberapa sebab (lihat ms 761G–I dan 762F–G).

(2) Adalah tidak adil dan saksama untuk menggantung prosiding penggulungan dan menafikan bank tersebut hak menggulungkan syarikat tersebut atas ketidakupayaan untuk membayar hutang. Ini adalah kerana tuntutan balas oleh syarikat tersebut masih

boleh diteruskan oleh syarikat tersebut oleh penyelesai bagi pihak syarikat tersebut di bawah s 236(2) Akta tersebut.

Juga, petisyen itu dikemukakan lima tahun dahulu dan hutang syarikat tersebut telah dibuktikan sejak tahun 1984. Prosiding dalam bentuk pelaksanaan penghakiman tidak patut dibenarkan berlarutan dan lebih-lebih lagi di mana prosiding melibatkan penggulungan wajib sesebuah syarikat (lihat ms 762I dan 763A).]

Notes

For cases on winding up, see 3 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 399–570.

Legislation referred to

Companies Act 1965 ss 218, 221(1), 236(2)
Companies (Winding-up) Rules 1972 rr 28, 30(1)
National Land Code 1965 s 254

Appeal from: Company Winding-Up No D1–23–56–92 (High Court, Kuala Lumpur)

Dennis Xavier (*Jayaraman Ong & Co*) for the appellant.
DP Naban (*SP Muthuveloo* with him) (*Lee & Hishammuddin*) for the respondent.

Siti Norma Yaakob JCA (delivering the judgment of the court): We heard this appeal, dismissed it with costs and we now give our reasons for our decision.

On 30 November 1995, the High Court ordered the winding up of the appellant ('the company') after allowing a preliminary objection raised by the respondent/petitioner ('the bank') that there was no cross-claim disclosed by the company that warranted their notice of intention to oppose the petitioner to be heard on its merits. It is to appeal against this order that the parties were before us.

By way of a factual background, we need to go back to 1982 when on 11 February of that year, the bank approved an additional overdraft facility for RM5.5m to one T Raju s/o M Kerpaya @ Jayaraman s/o M Kerpaya ('the borrower') for a period of one year and repayable on demand. The overdraft facility was secured by a first legal charge created on land Pegangan No 1361, Pechahan Bandar 1, Daerah Timur Laut, Pulau Pinang ('the charged land') of which the company was the registered proprietor at the material time.

On 24 February 1984, the bank issued a letter of demand to the company stating the amount of the borrower's indebtedness to be RM8,741,469.37 as at 19 February 1984 and demanding that the company pay the amount within 14 days of the date of the letter of demand, failing which the bank would proceed to foreclose the charged land and sell it under the provisions of the National Land Code 1965 ('the NLC').

Needless to say, the company failed to comply with the letter of demand and on 15 March 1984, the bank served the company with a Form 16D notice, pursuant to s 254 of the NLC. The company also failed to remedy the specified breach within the time stipulated in the statutory notice and the bank filed Originating Summons No F 525 of 1984 in the High Court at Kuala Lumpur praying principally for an order of sale of the charged land. A consent order to that effect was obtained by the bank on 3 April 1985 for the recovery of RM10,450,952.26. The charged land was subsequently auctioned for RM1,162,800 on 19 September 1988.

Since the proceeds of sale were insufficient to settle the borrower's indebtedness in full, the bank filed Civil Suit No D4–22–1509–90 (High Court, Kuala Lumpur) ('the 1990 suit') against the company and another claiming the balance of RM10,324,147.03, interest at 16% pa on monthly interests from 1 August 1990 to date of realization and costs after credit was given for the proceeds of sale. Summary judgment under O 14 of the Rules of the High Court 1980 was obtained by consent on 4 July 1991 and thereafter the bank took steps to enforce the judgment sum.

This came in the form of a statutory notice dated 30 November 1991 under s 218 of the Companies Act 1965 ('the Act'), and served on the company on 2 December 1991.

The company failed to comply with the notice calling upon them to make payment of RM12,763,391.24, the judgment sum inclusive of interest and costs remaining outstanding as at 30 November 1991 within the three weeks limited by the notice, and the bank then issued Winding-Up Petition No D2–28–56–92 dated 31 January 1992 and 24 September 1992 was endorsed as the hearing date of the petition. On 21 September 1992, three days before the hearing, the company filed a notice of intention to oppose the petition on the ground that they disputed the debt due to the bank.

After a number of postponements, the petition was finally fixed for hearing on 24 November 1995, four years after the petition was presented. This delay was due to the fact that:

(1) The company filed appeals against the consent judgment obtained in the 1990 suit. The first appeal to the judge in chambers was dismissed and likewise, their subsequent appeal to the (then) Supreme Court on 8 December 1994. An application for stay of execution was also made by the company but this too was refused by the High Court on 20 June 1995.

(2) The company, as co-plaintiff together with the borrower and another, sued the bank as defendant, in Civil Suit No S4–22–551–91 (High Court, Kuala Lumpur) ('the 1991 suit') for negligence and fraud. They claimed that the bank was negligent when the charged land was sold below market price and the alleged fraud made reference to the bank's representation that sums were due under the charge and acting on that representation, they had agreed to the sale of the charged land. Based on these allegations, the company contended that the consent order for sale of the charged property should be set aside or alternatively, damages be awarded. This 1991 suit is still pending.

A Going back to 24 November 1995 when the petition was before the High Court together with the notice to oppose dated 21 September 1992 which was supported by four affidavits in opposition, the bank raised the preliminary objection that the court should not admit the four affidavits on the ground that they had failed to comply with r 30(1) of the Companies (Winding-up) Rules 1972 ('the 1972 Rules'). The learned judge agreed B with the bank and since evidence of the cross-claim on which the company relied to oppose the petition is contained in the four affidavits and with their non-admission, the company was left with no ground to oppose the petition, the learned judge ordered that the company be wound up, the official receiver be appointed as provisional liquidator and the bank's costs C be paid out by the provisional liquidator from the company's assets.

The memorandum of appeal contains 19 paragraphs setting out various grounds but before us, Mr Dennis Xavier, counsel for the company, confined his arguments to two issues, namely:

D (1) that the trial judge's refusal to grant an adjournment of the hearing of the petition on 24 November 1995 had prejudiced the company; and

(2) that since the trial judge had never heard the petition on its merits, the winding-up order made by him could not be upheld.

E From the notes of proceedings, it is clear that the company had requested for an adjournment of the hearing of the petition under s 221(1) of the Act on the ground that they had a cross-claim against the bank which has already been pleaded in the 1991 suit which is still pending. The appellant contended that the 1991 suit should be heard and determined before the petition is heard on its merits as the success of the 1991 suit in their favour F would extinguish the debt due to the bank, the very debt upon which the petition is founded.

Section 221 of the Act empowers the court with the discretion to grant an adjournment but in this instance, the learned judge refused to exercise his discretion and we consider that he had rightly done so for the G following reasons.

Evidence of the company's cross-claim is traversed in four affidavits supporting their notice of intention to oppose the petition. Objection to the admissibility of these four affidavits was taken by the bank for non-compliance with r 30(1) of the 1972 Rules, which reads as follows:

H 30 Affidavits opposing the petition and affidavits in reply

(1) Affidavits in opposition to a petition that a company may be wound up shall be filed and a copy thereof served on the petitioner or his solicitor at least seven days before the time appointed for the hearing of the petition.

I The first date of hearing of the petition is endorsed in the petition to be 24 September 1992. The notice of intention to oppose the petition is dated 21 September 1992 and in the absence of any evidence to the contrary, we take 21 September 1992 as the date the notice was served on the bank. No objection can be raised as to the fact that the bank became

aware of such objection three days before the hearing as r 28 of the 1972 Rules prescribes that the notice 'shall be served or if sent by post shall be posted in such time as in ordinary course of post to reach the address not later than 12 o'clock noon of the day previous to the day appointed for the hearing of the petition'. A

On 24 September 1992, the petition was adjourned to 27 January 1994 to await the outcome of the appeal pending in the 1990 suit but two days before that, on 25 January 1994, the company served the bank with the first of the four affidavits in opposition affirmed on 25 January 1994 by one Leong Chi Kong. Clearly, service of this affidavit contravened r 30(1). B

The petition was not heard on 27 January 1994 but adjourned to 15 February 1994 for the same reason that it was adjourned previously, ie to await the outcome of the appeal pending in the 1990 suit. Two days before the adjourned hearing and on 13 February 1995, the company served the bank with the second affidavit in opposition affirmed on 10 February 1995 by one Abdul Latiff bin Ismail, the very same affidavit that was used by the company in their application for a stay of execution in the 1990 suit. Here again, there has been a blatant disregard of r 30(1). C D

The petition was not heard on 15 February 1995, but instead adjourned to 17 August 1995, when a third affidavit in opposition affirmed by the same Abdul Latiff bin Mohd Ismail affirmed on 15 August 1995 was served on the bank on 16 August 1995, a day before the hearing. This is yet another instance where r 30(1) had not been complied with. E

The petition was also not heard on 17 August 1995 but instead adjourned to 24 November 1995, but a day before the hearing, ie on 23 November 1995, the company served on the bank their fourth affidavit in opposition affirmed by the same Abdul Latiff bin Mohd Ismail on 21 November 1995. Again, there has been non-compliance of r 30(1). F

By their words and expression, r 30(1) is mandatory in nature and as such, the learned judge was correct when he refused to admit all four affidavits in opposition for non-compliance of that particular rule. The fact that the four affidavits were only relied upon on 24 November 1995 does not alter the position as such affidavits were intended for use in the earlier hearings which never took place as all the earlier hearings were adjourned for some reason or other. G

Since the four affidavits containing averments of the cross-claims are inadmissible in evidence, the only other evidence of the cross-claim available to the company is that pleaded in their 1991 suit, which is yet to be heard and determined. It must not be forgotten that the petition is founded on a judgment that had been obtained by consent and since that consent judgment is now being questioned in the 1991 suit, an issue arises as to the bona fide of the cross-claim itself. Under these circumstances, we consider that it is unjust and inequitable to stay the winding up proceedings and deny the bank the right to have the company wound up for their inability to pay their debt. This is so as the cross-claim can still be proceeded by the liquidator on behalf of the company under s 236(2) of the Act. H I

A The other factor that swayed us was the fact that the petition was presented five years ago and that the company's indebtedness had been established as long ago as 1984. Proceedings in the form of execution of judgments should never be allowed to drag on and more so where such proceedings concern the compulsory winding up of a company.

B For the reasons that we have given, we do not consider that the learned trial judge had erred in law when he refused to exercise his discretion under s 221 of the Act and since there was no valid cross-claim to consider, he had every right to have the company wound up and to make the other consequential orders.

C *Appeal dismissed.*

Reported by Kenneth Goh

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